

Singh (Migration) [2022] AATA 1579 (23 February 2022)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Jassa Singh

REPRESENTATIVE: Mr Ejaz Khan (MARN: 0213478)

CASE NUMBER: 2109787

HOME AFFAIRS REFERENCE(S): BCC2017/1508951

MEMBER: Kira Raif

DATE: 23 February 2022

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 23 February 2022 at 1:57pm

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820 – applicant did not have a substantive visa at the time of application – existence of hardship does not necessarily equate to the existence of compelling reasons – not satisfied that there are compelling reasons for not applying the Schedule 3 criteria –decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, Schedule 2, cl 820.211, Schedule 3

CASES

Babicci v MIMIA (2005) 141 FCR 285

Chan v MIBP [2017] FCCA 2883

MZYPZ v MIAC [2012] FCA 478

Nazir v MIBP [2018] FCCA 861

Plaintiff M64/2015 v MIBP [2015] HCA 50

Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

Application for review

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant is a national of India, born in April 1981. He applied for the visa on 21 April 2017 on the basis of his relationship with his sponsor. The delegate refused to grant the visa, finding that the visa applicant did not satisfy cl 820.211, because the delegate was not satisfied the applicant met the Public Interest Criterion (PIC) 3001 and found there were no compelling reasons for not applying that criterion.
3. The applicant sought review of the delegate's decision. In January 2021 the Tribunal (differently constituted) affirmed the decision under. The applicant sought judicial review of the Tribunal's decision and the matter was remitted to the Tribunal for reconsideration.
4. The applicant appeared before this Tribunal on 15 February 2022 to give evidence and present arguments. The applicant has nominated his wife to give oral evidence but she had left the premises before giving evidence and, despite the Tribunal spending some time waiting for her to become available, she has not made herself available to give oral evidence. In the course of the hearing, the applicant suggested that his step-daughter could also give oral evidence. The applicant had not previously nominated her as a witness (the Tribunal notes that the applicant is legally represented). The Tribunal decided not to take oral evidence from the step-daughter but invited the parties, including the sponsor and her daughter, to provide written statements. The applicant's representative provided a written submission dated 21 February 2022. It was not accompanied by written statements from the sponsor, her daughter or any other witness. No request has been made by the representative or the applicant to conduct a further hearing to enable the sponsor or others to give oral evidence.
5. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages. The applicant was represented in relation to the review. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

Relevant law

6. At the time the application was made, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).
7. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl 820.211(2)(d).
8. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day.

Does the applicant meet Schedule 3 criteria, or are there compelling reasons for not applying those criteria?

9. The applicant provided to the Tribunal a copy of the primary decision record. It indicates that the applicant entered Australia as a holder of a Student visa in September 2014 and that his visa was cancelled in October 2016. The applicant then became an unlawful non-citizen and made the application for the Partner visas in April 2017.
10. In oral evidence to the Tribunal the applicant stated that he entered Australia as a dependent on his then partner's Student visa. He states that he was unaware when his visa was cancelled or that his wife filed for a divorce. He believes his student visa was cancelled because the relationship ended but he is not sure. The applicant states that he was under the impression that he had a four year visa and did not understand the Australian law. The applicant confirmed his immigration history set out above.
11. The Tribunal finds, having regard to the above information, that the applicant last held a substantive visa before the cancellation of his Student visa in October 2016. He did not have a substantive visa since that time and he was not a holder of a substantive visa at the time the application for the Partner visa was made. There is nothing to suggest that the applicant entered Australia as a holder of a Subclass 995 (Diplomatic) visa or as a special purpose visa holder. The Tribunal is not satisfied the applicant meets cl. 820.211(d)(i).
12. The applicant is required to satisfy the Schedule 3 criterion 3001 for the purpose of cl. 820.211(d)(ii). There is nothing before the Tribunal to indicate that the applicant held an entry permit that was valid up to and including 31 August 1994. There is nothing to indicate that the applicant became an illegal entrant before 1 September 1994. There is nothing to indicate that the applicant ceased to hold a criminal justice visa on or after 1 September 1994 or that he entered Australia unlawfully on or after 1 September 1994. There is nothing to suggest that the last substantive visa held by the applicant was cancelled and the Tribunal has made a decision to set aside and substitute the cancellation decision.
13. The Tribunal has found that the applicant ceased to hold a substantive visa when his Student visa was cancelled in October 2016. The Tribunal finds that that date is the 'relevant day' within the meaning of subclause 3001(2)(c)(i) of Schedule 3. As the application for the Partner visa was made in April 2017, the Tribunal is not satisfied that the application was validly made within 28 days after the relevant day. The Tribunal is not satisfied that the applicant meets Item 3001.

Should the requirements of Item 3001 be waived?

14. Clause 820.211(d)(ii) allows for this criterion to be waived if the Tribunal is satisfied that there are compelling reasons for not applying the criterion. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
15. The expression 'compelling reasons' is not defined for these purposes. However, reasons that are compelling should 'force or drive the decision-maker' 'irresistibly' to some end: *Plaintiff M64/2015 v MIBP* [2015] HCA 50 at [31]. The reasons or circumstances should be sufficiently powerful to lead a decision-maker to find that the criteria should not be applied: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.

16. In oral evidence the applicant stated that at the time when his Student visa was cancelled, he was unaware that his visa was cancelled and he was depressed because of the relationship breakdown and 28 days went by very quickly. The Tribunal has difficulty accepting that evidence, in the absence of any medical evidence about the applicant suffering depression. More significantly, the issue before the Tribunal is not the reason why the applicant did not make the present application within 28 days. The issue is the existence of compelling reasons for the waiver at the time of this decision. The Tribunal does not consider that the circumstances that led to the cancellation of the Student visa (which occurred over five years ago) constitute, at present, a compelling reason for the waiver.
17. The applicant states that he suffers from depression and because of that he does not know what he is doing and when he is depressed, he cannot eat or think and he cannot work and he just stays in his room. He told the Tribunal he has been taking anti-depressant medication for about 5-6 months (following the hearing the applicant provided to the Tribunal evidence of the prescription) but has no other treatment and does not see doctors regularly. The applicant states that his health also improved because of the support from his family (giving him food and medication).
18. The applicant states that he has been working as an Uber delivery driver for the past 1-1.5 years and he works up to 40-50 hours a week. About 3-4 months ago he took time off work due to depression but since that time he has been working continuously without any breaks. The Tribunal is prepared to accept that the applicant was diagnosed as suffering from depression for which he was prescribed medication. However, in the circumstances where the applicant has been able to lead a normal life for the past 3-4 months (on his own evidence) and work long hours, the Tribunal is of the view that the applicant's depression is presently under control. While the applicant refers to the support he had received from his family while he was depressed, there is no probative evidence, and the Tribunal is not satisfied that the applicant has been able to manage his condition because of his proximity to his family. For example, there is no report from the applicant's treating doctor or a health professional that indicates that the presence of the applicant in Australia or close to family in Australia had affected his health or had improved his condition or, conversely, that separation from the family would adversely affect the applicant's health.
19. The applicant claims that if he has to return to India, he would 'go into depression' again because he would not have the support of his family. He claims that his entire family is in Australia and separation from his family would result in his depression getting worse. The Tribunal finds that claim unconvincing. In the Tribunal's view, a prediction of future depression needs to be made, or at least supported, by a professional opinion and not mere guesswork by the applicant (or his representative). As noted above, there is no medical evidence or evidence from a health professional or otherwise qualified person, before the Tribunal that indicates that if the applicant is separated from his family in Australia as a result of the waiver not being applied, or if he was to return to India for what is most likely to be a temporary but lengthy period, this would result in him suffering from depression or his depression getting worse or that these factors would otherwise have any adverse effect on the applicant's health.
20. The Tribunal has formed the view that at the time of this decision, the applicant's depression is managed through medication. The Tribunal is not satisfied on the evidence before it that the applicant's condition would be adversely affected if the waiver is not applied. In these circumstances, the Tribunal does not consider that the applicant's depression constitutes a compelling reason for the waiver.
21. The applicant told the Tribunal that his mother lives in Italy and his two brothers live in Italy and England. He did not migrate with them at the time because it was hard for him to get a visa. The applicant claims he has nothing in India and nowhere to live and he would have no

support in India. The Tribunal accepts that the applicant has no immediate family in India and is prepared to accept that the applicant may not have family support available to him in his home country. However, the Tribunal is also of the view that as a mature adult, the applicant is able to live independently while emotional support may be provided to him by others irrespective of their place of residence.

22. The applicant states that before coming to Australia he worked as a driver and was a farmer and he was 'just surviving' in Punjab. The applicant states that he has been living for ten years in Australia and has lost all his contacts in India and claims it would be hard for him to find a job and his friends do not have work. The Tribunal is prepared to accept that, given the length of the applicant's stay in Australia, he has lost contacts and connections in India. However, the applicant presented no evidence to support his assertion that he would be unable to find a job in India and support himself (including finding a place to live). The applicant's evidence is that he has not looked for work in India since coming to Australia and in the Tribunal's view, it is therefore not possible to state that the applicant would be unable to find a job and support himself in India or that it would be difficult for him to get a job. On the limited evidence before it, the Tribunal is not satisfied that the applicant would have nowhere to live and that he would not be able to find employment and support himself in India. The Tribunal does not consider these circumstances constitute compelling reasons for the waiver.
23. The Tribunal questioned the applicant about the family's financial affairs. The applicant states that his partner works in a factory, about 10-15 hours a week but it is not regular employment. The applicant states that she also receives Centrelink payments but had difficulty explaining what kind of Centrelink benefits the sponsor receives. He initially suggested unemployment benefits but then said 'health benefits'. The applicant confirmed that even though his partner received a pension, he did not know what kind of pension she received and did not know how much she received. The applicant ultimately told the Tribunal that she receives about \$500-\$600 from Centrelink and not more than \$300 from her job because she does not work regularly. The applicant states that the money goes into his wife's bank account and he does not check it. The Tribunal has formed the view that the applicant has very limited (at best) knowledge of the sponsor's financial affairs. The Tribunal is not satisfied the applicant has displayed knowledge of the sponsor's financial circumstances that is consistent with the existence of a genuine and long-term spousal relationship.
24. Importantly, the applicant's evidence to the Tribunal is that when he did not work for about three months, the family relied on the sponsor's income from work and Centrelink and they 'survived'. The applicant's evidence suggests that while his income may contribute to the family budget (giving the applicant the benefit of the doubt), it is possible for the family to meet its financial obligations without the applicant's income. The Tribunal accepts that if the applicant does contribute to meeting the family's financial needs, his contribution is helpful and beneficial but the Tribunal is not satisfied such contribution is necessary to ensure the family meets its needs. In such circumstances, the Tribunal does not consider that any financial support the applicant may provide to the sponsor or the family (if he does) constitutes a compelling reason for the waiver.
25. With respect to his wife's health, the applicant told the Tribunal that the sponsor has an ovarian cyst, which affects her cycle and blood circulation and she has no other health issues. The applicant repeatedly told the Tribunal that the sponsor has no other health issues. The applicant told the Tribunal his wife sees a doctor but was unable to state whether the doctor was a specialist and, if so, what type of specialist. He also could not name the medication his wife was taking. The applicant suggested in oral evidence that his English is not good and that is the reason he could not provide such information, however, the applicant claims he communicates with his wife in English and in the Tribunal's view,

given the length of their claimed relationship and daily contact in English, the applicant would have had sufficient time to explore these matters with his partner and to understand more fully her circumstances.

26. In his post-hearing submission, the applicant stated that it is not reasonable to expect him to know the exact name of the medication or the names of all of his wife's doctors given his education background. No explanation is offered as to what it is in the applicant's education background that would prevent him from being able to recall the name of the medication his wife takes or the details of her doctor or the nature of the doctor's practice. In the absence of such explanation, the Tribunal does not consider there is anything specific about the applicant's education (or lack of it, if that is the claim) that would prevent the applicant from knowing these details. The Tribunal does not consider it is unreasonable for the applicant to have that information, given the support the applicant claims to provide to his wife, including in relation to her medical condition.
27. Given the applicant's limited knowledge about his wife's treatment, the Tribunal is not satisfied that the applicant provides meaningful help or support to his wife or that he has a genuine involvement in managing her health condition. In such circumstances, the Tribunal does not consider that the wife's health condition constitutes a compelling circumstance for the waiver.
28. The applicant refers to the help and support he receives from the family, including physical support he receives when he is depressed. The applicant states that he cannot live without the family and cannot live without his wife and children and grandchild. The applicant notes that the relationship has existed for over six years. He has two daughters aged 23 and a son aged 15. One of the daughters is married and lives separately. The other daughter sometimes stays with them. The 15 year old son lives with them (when the Tribunal questioned the applicant about the son's study, the applicant appeared to have needed prompting to answer the question). The Tribunal has significant reservations about the nature of the applicant's relationship with his partner, given the applicant's limited knowledge about the sponsor's treatment and financial affairs. Nevertheless, for the purpose of this review only and to give the applicant the benefit of the doubt, the Tribunal accepts that the applicant and the sponsor may live in a spousal relationship and such a relationship has existed for approximately six years. The Tribunal accepts, for the purpose of this review only, that the applicant has established a relationship with his wife's three children and a grandchild. The applicant refers to having a parental relationship with the youngest child and while the Tribunal has significant reservations about that evidence, for the purpose of this review, the Tribunal accepts that this is so. However, in the Tribunal's view, that is not sufficient in the circumstances of this case, and even having regard to the sponsor's and the couple's particular circumstances which are elsewhere in this decision, to establish the existence of a compelling reason for not applying the Schedule 3 criteria.
29. The criteria in cl.820.211(2)(a) is that the applicant is the spouse or de facto partner of the sponsoring partner. This, in part, requires the applicant and the sponsor to be in a genuine, continuing and exclusive relationship. If an applicant does not hold a substantive visa and does not meet the Schedule 3 criteria, the requirement in cl.820.211(2)(d)(ii) to provide compelling reasons for not applying those criteria is in addition to the criteria in cl.820.211(2)(a). Accordingly, simply the fact that the parties are in a genuine and continuing relationship is not of itself a compelling reason for not applying the Schedule 3 criteria as it is already a criteria which must be satisfied in order to meet the criteria in cl.820.211(2)(a). If the relationship itself can be considered a compelling reason for not applying the Schedule 3 criteria, it must be the particular aspects of the relationship which must provide a compelling reason for not applying the Schedule 3 criteria and not simply the fact that the parties are in a relationship.

30. Thus, as a genuine spousal relationship is the basic requirement for a partner visa application, the Tribunal is not satisfied that the genuineness, mutual commitment, emotional and physical support, continuing nature and longevity of the parties' relationship or the parties' (likely temporary) separation are on their own and without more, circumstances that should compel the Tribunal to not apply the Schedule 3 criteria. The Tribunal is not satisfied on the evidence that the parties' relationship is a compelling reason for not to apply the Schedule 3. In reaching this conclusion, the Tribunal has had regard to the reasoning in *Chan v MIBP* [2017] FCCA 2883 at [14] and *Nazir v MIBP* [2018] FCCA 861 at [29]–[30].
31. The Tribunal has considered whether the particular circumstances of this case render the existence of the relationship a compelling reason for the waiver. The applicant refers to the length of his relationship with the sponsor and the nature of his relationship with his wife and her children and grandchild, stating that he cannot live without them. The applicant refers to having a parent – child relationship with the sponsor's children. The Tribunal acknowledges that evidence and accepts that if the applicant is in a genuine relationship with his partner, he and his partner may provide each other with emotional support and the applicant may also provide such support to the children and grandchild. However, the Tribunal does not consider that the provision of emotional support can only occur when the family live in the same household or even the same country. It is possible (and not uncommon) in the Tribunal's view for emotional and other support to be provided when parties live in different countries. That is, if the waiver is not applied and if the applicant is required to leave Australia and be separated from his family (potentially for a temporary, albeit lengthy period as he has the option of seeking another Partner visa offshore), the Tribunal is not satisfied that his will result in the withdrawal of emotional support the applicant can provide to, and receive, from his family in Australia. The Tribunal acknowledges that the support may be different in nature and accepts that it may not be of the same quality but in the Tribunal's view, it need not cease.
32. Overall, the Tribunal accepts that some hardship would be caused to the applicant and the sponsor and her family in Australia if the applicant is required to leave the country as a result of the waiver not being applied. However, the existence of hardship does not necessarily equate to the existence of compelling reasons. In this case, the Tribunal has formed the view that the sponsor is able to meet her financial obligations whether or not she receives financial support from the applicant (even if it may be easier for her to do so with the financial support from the applicant) and that any emotional support between the applicant and his family in Australia need not cease if the waiver is not applied. If the relationship is genuine, such emotional support can continue. The Tribunal has formed the view, having regard to all the circumstances and the particular circumstances of the parties, that the length and nature of their relationship and its existence do not constitute a compelling reason of the waiver. The Tribunal has also formed the view that the applicant's own health, and the sponsor's health do not, in light of their particular circumstances and for the reasons set out above, constitute compelling reasons for the waiver.
33. The applicant states that it is unreasonable for his family to visit him in India due to high crime rate, threat of terrorist activity, impacts of Covid, vehicle accidents, etc. The applicant states that if he was to apply for the visa offshore, it could take over two years which would lead to a long-term separation of the couple who have been living together for many years. The Tribunal acknowledges that evidence. The Tribunal accepts that the sponsor and her family may decide to travel to India or they may choose to, for a variety of reasons, not to and in that case, there may be lengthy separation if the applicant was to apply for the visas offshore. The Tribunal accepts a certain degree of hardship to the applicant and sponsor and family members may be caused by lengthy separation, although the Tribunal is also mindful that they can maintain regular and frequent contact by electronic means. In the Tribunal's view, and having regard to the particular circumstances of this relationship, the Tribunal does

not consider that separation, even a lengthy separation, would constitute a compelling circumstance in this case.

34. The applicant states that while it is possible for others to live separately while in a relationship, it is not in his culture not to live with a partner after marriage. The Tribunal finds that submission unpersuasive because any separation would be due to visa issues, rather than any decisions made by the applicant and sponsor and the Tribunal is of the view that it is not against the applicant's culture (or any other culture) to follow a country's migration laws. If the application of such laws leads to a temporary (albeit lengthy) separation of partners, that would be understood in any culture. Compliance with visa processes is not uncommon in Indian culture and the Tribunal does not accept that the applicant's or sponsor's particular circumstances mean that any separation would affect them differently.
35. The Tribunal has considered the totality of the applicant's circumstances both singularly and cumulatively. The Tribunal has formed the view that these are not of sufficiently power nature to least the Tribunal to find that the schedule 3 criteria should not be applied. Nor are they of a nature that 'force or drive the [Tribunal] irresistibly to some end'. The Tribunal has formed the view that these circumstances are not of compelling nature. Overall, the Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl 820.211(2)(d)(ii).

Conclusion

36. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

37. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Kira Raif
Senior Member